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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 PATRICIA A. GRANT,

8 Plaintiff,

9 v.

10 CLAUDIO GABRIEL ALPEROVICH, et  
al.,

11 Defendants.

Case No. C12-1045RSL

ORDER GRANTING  
DEFENDANTS THIRLBY'S  
AND VIRGINIA MASON  
MEDICAL CENTER'S  
MOTION FOR SUMMARY  
JUDGMENT

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15 **I. INTRODUCTION**

16 This matter comes before the Court on defendants' "Motion for Summary  
17 Judgment of Dr. Thirlby and VMMC" (Dkt. # 59). Summary judgment is appropriate  
18 when, viewing the facts in the light most favorable to the nonmoving party, there is no  
19 genuine dispute as to any material fact that would preclude the entry of judgment as a  
20 matter of law. L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir.  
21 2012). The party seeking summary dismissal of the case "bears the initial responsibility  
22 of informing the district court of the basis for its motion," Celotex Corp. v. Catrett, 477  
23 U.S. 317, 323 (1986), and identifying those portions of the materials in the record that  
24 show the absence of a genuine issue of material fact, Fed. R. Civ. P. 56(c)(1). Once the  
25 moving party has satisfied its burden, it is entitled to summary judgment if the non-

1 moving party fails to identify specific factual disputes that must be resolved at trial.  
2 Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1059 (9th Cir. 2012). The mere  
3 existence of a scintilla of evidence in support of the non-moving party's position will  
4 not preclude summary judgment, however, unless a reasonable jury viewing the  
5 evidence in the light most favorable to the non-moving party could return a verdict in its  
6 favor. United States v. Arango, 670 F.3d 988, 992 (9th Cir. 2012).

7 Having reviewed the memoranda, declarations, and exhibits submitted by the  
8 parties, the Court finds as follows:<sup>1</sup>

## 9 **II. DISCUSSION**

### 10 **A. Background Facts**

11 In June 2009, Plaintiff underwent gastric bypass surgery without complication at  
12 St. Francis Hospital in Federal Way, Washington. Dkt. # 3-1 at 10. During the months  
13 following surgery, Plaintiff saw several doctors and was hospitalized for concerns  
14 related to dehydration, nausea, and vomiting. Id. She was treated for an oral yeast  
15 infection in early July 2009, but still remained concerned that the infection was causing  
16 her nausea weeks later. Dkt. # 50-1 at 4, 7. In July, an endoscopy revealed a hernia, but  
17 no evidence of an oral yeast infection. Dkt. # 3-1 at 7. Similarly, a CT scan showed a  
18 hematoma and signs of afferent loop syndrome, but no indication of leakage,  
obstruction, or infection. Id. at 6, 7.

19 Despite Plaintiff's many hospitalizations and visits to the emergency room, her  
20 nausea and vomiting continued. After seeing several different specialists and  
21 undergoing a variety of tests at Pacific Medical Centers ("PacMed") and St. Francis  
22 Hospital, Plaintiff's primary care physician at PacMed referred her to Virginia Mason  
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24 <sup>1</sup>The Court GRANTS Plaintiff's unopposed motion for additional time to file surreply  
25 (Dkt. # 126).

1 Medical Center (“VMMC”)<sup>2</sup> for additional care. See Dkt. # 3-2 at 10; Dkt. # 123 at 3.  
2 She was hospitalized at VMMC in September 2009. See Dkt. # 3-2 at 16. Dr. Richard  
3 Thirlby, a VMMC bariatric surgeon, provided a consultation and suggested that there  
4 may be hematoma or leak causing Plaintiff’s symptoms. Id. Plaintiff underwent another  
5 endoscopy and Dr. Drew Schembre, a VMMC gastroenterologist, noted that the  
6 endoscopy was, for the most part, normal. Dkt. # 123 at 3-4. He recommended  
7 conducting additional tests if her symptoms continued. Id.

8 Plaintiff returned to VMMC in early November 2009, concerned that her  
9 condition had worsened. Dkt. # 3-2 at 16. Dr. Schembre examined Plaintiff and  
10 recommended that she undergo a deep enteroscopy to determine whether there were any  
11 twists or obstructions at the site of her surgery. Id. at 17. He noted that Plaintiff’s  
12 underlying psychological issues were likely contributing to her concerns and he  
13 recommended that mental health services become involved. Id. at 18.

14 Dr. Schembre performed the double balloon deep enteroscopy in early December  
15 2009. Id. at 12. The test revealed a small obstruction, which Dr. Schembre noted may  
16 be causing Plaintiff’s discomfort. However, he could not be certain that it was the  
17 source of her problems and he recommended additional investigation and perhaps  
18 exploratory surgery. Id. at 13. After the enteroscopy, Dr. Thirlby reviewed the results  
19 and Dr. Schembre’s notes with Plaintiff. He explained that the results of the study did  
20 not show a “clear-cut surgical explanation for her symptoms,” and as a result, he was  
21 reluctant to perform such a high-risk surgery at that time. Id. at 20. Instead, Dr. Thirlby  
22 recommended trying a nasal feeding tube to provide temporary relief. Id.

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23 <sup>2</sup> Plaintiff identifies “Virginia Mason Health System” as a defendant. Based on Virginia  
24 Mason Medical Center’s corporate disclosure statement, dkt. # 56, the Court finds that  
25 defendant’s correct name is “Virginia Mason Medical Center.”

1 In winter of 2010, Plaintiff was still experience discomfort and was not satisfied  
2 with the care she had received so she sought additional treatment from Dr. Elliott  
3 Goodman, a surgeon in New York. Dr. Goodman performed corrective surgery in  
4 February 2010. Id. at 3-5.

### 5 **B. Procedural History**

6 On June 15, 2012, Plaintiff sued Dr. Thirlby and VMMC (collectively  
7 “Defendants”) and the other named defendants for negligence and medical malpractice  
8 in King County Superior Court. Dkt. # 60 at 5-16. The state court granted Defendants’  
9 motion for summary judgment on November 9, 2012. Dkt. # 60 at 18-19.

10 Plaintiff filed this lawsuit against defendants the same day she filed her state  
11 court action. Dkt. # 1. On February 21, 2013, all but two defendants filed dispositive  
12 motions in this case. Dkt. # 50; Dkt. # 53, Dkt. # 54, Dkt. # 55, Dkt. # 59, Dkt. # 61.  
13 Recognizing that “[r]esponding to six dispositive motions on the same day would be a  
14 daunting task for a licensed attorney, much less a plaintiff appearing pro se,” the Court  
15 granted Plaintiff’s request for additional time in which to respond to the motions and  
16 renoted defendants’ dispositive motions. Dkt. # 82.

17 One week after defendants filed their dispositive motions, Plaintiff sought leave  
18 to file a third amended complaint. Dkt. # 62. In her third amended complaint, Plaintiff  
19 asserts that defendants violated (1) Title II and Title III of the Americans with  
20 Disabilities Act (“ADA”); (2) Title II, Title VI, and Title XI of the Civil Rights Act; (3)  
21 the Age Discrimination Act of 1975; (4) the Health Insurance Portability and  
22 Accountability Act of 1996 (“HIPAA”); and (5) the Mental Health Bill of Rights, 42  
23 U.S.C. § 9501. Id. at 3-4. Under the liberal pleading standard afforded pro se plaintiffs,  
24 Haines v. Kerner, 404 U.S. 519, 520-21 (1972), Plaintiff’s third amended complaint also  
25 appears to assert claims under 42 U.S.C. § 1983, 42 U.S.C. § 1985, as well as claims of

1 libel, slander, defamation, and health care fraud. Dkt. # 62. The Court granted  
2 Plaintiff's motion to amend in part, accepting Plaintiff's third amended complaint as the  
3 operative pleading, but dismissing the claims asserted under the Mental Health Bill of  
4 Rights. Dkt. # 92 at 2-3.<sup>3</sup>

### 5 **C. Plaintiff's Requests for Continuance**

6 As a preliminary matter, in both her opposition and surreply Plaintiff presents  
7 vague requests to deny Defendants' summary judgment motion to allow her to conduct  
8 "discovery investigations" for trial. See Dkt. # 122 at 1, 2, 15, 16; Dkt. # 133 at 7, 10.  
9 The Court interprets these references as requests to continue summary judgment  
10 pursuant to Rule 56(d) of the Federal Rules of Civil Procedure ("Rule 56(d)").

11 Rule 56(d) allows a party opposing a motion for summary judgment to request a  
12 continuance to conduct additional discovery to support her opposition. Fed. R. Civ. P.  
13 56(d). However, "[a] party requesting a continuance pursuant to Rule 56(d) must  
14 identify by affidavit the specific facts that further discovery would reveal, and explain  
15 why those facts would preclude summary judgment." Tatum v. City & Cnty. of San  
16 Francisco, 441 F.3d 1090, 1100 (9th Cir. 2006). "The burden is on the party seeking  
17 additional discovery to proffer sufficient facts to show that the evidence sought exists  
18 and that it would prevent summary judgment." Nidds v. Schindler Elevator Corp., 113  
19 F.3d 912, 921 (9th Cir. 1996) (internal citations omitted). Plaintiff has not met this  
20 burden.

21 Plaintiff's references to additional discovery shed little light on the nature of the  
22 evidence sought, whether the evidence exists, or whether the evidence would be

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23 <sup>3</sup> Because Plaintiff filed her third amended complaint after Defendants filed their  
24 motion for summary judgment, Defendants raise arguments seeking dismissal of certain claims  
25 for the first time in their reply. The Court usually declines to consider arguments first raised in  
26 reply, however, because Plaintiff anticipated these arguments in her opposition, dkt. # 122, and  
provided additional arguments in response in her surreply, dkt. # 133, the Court finds  
Defendants' requests for dismissal ripe for consideration.

1 sufficient to defeat summary judgment. For example, Plaintiff asks the Court to  
2 “GRANT Plaintiff discovery investigations, identification of further defendants and  
3 preparation for trial against VMMC and Codefendants.” Dkt. # 122 at 2. This request,  
4 without more, fails to inform the Court of the specific information Plaintiff seeks and  
5 whether additional discovery would prevent summary judgment. The only specific  
6 evidence identified by Plaintiff is evidence reflecting “financial payments between  
7 PacMed and VMMC” to support her health care fraud claim. *Id.* at 16. However, as  
8 explained below, this evidence would not prevent summary judgment. The Court  
9 therefore DENIES Plaintiff’s requests to continue summary judgment to allow her time  
10 to conduct discovery.

#### 11 **D. Civil Rights Act**

##### 12 **1. 42 U.S.C. § 1983**

13 To establish a §1983 claim Plaintiff must show (1) the deprivation of a right  
14 protected by the Constitution or a federal statute, and (2) that the deprivation was  
15 committed by a person acting under color of state law. Chudacoff v. Univ. Med. Ctr. of  
16 S. Nev., 649 F.3d 1143, 1149 (9th Cir. 2011). Defendants contend that Plaintiff’s  
17 claims under 42 U.S.C. § 1983 must be dismissed because she cannot establish the  
18 requisite state action. Dkt. # 59 at 5-6.

19 Plaintiff has not responded to Defendants’ argument and the Court, having  
20 conducted its own review, agrees with Defendants. It is undisputed that VMMC is a  
21 private, non-profit corporation and Dr. Thirlby is a VMMC employee, and there is no  
22 evidence in the record suggesting state action for purposes of § 1983. Therefore,  
23 Plaintiff’s claims under § 1983 against Defendants fail as a matter of law and are  
24 DISMISSED.

1           **2. 42 U.S.C. § 1985**

2           Defendants also argue that it is undisputed that they were not involved in a  
3 conspiracy to deprive Plaintiff of a federal right, and they are therefore entitled to  
4 summary judgment on Plaintiff's § 1985 claims. Dkt. # 59 at 6-8. To succeed on a  
5 claim under 42 U.S.C. § 1985(3), Plaintiff must prove (1) conspiracy, (2) for the  
6 purpose of depriving her of the equal protection of the laws or equal privileges and  
7 immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) an injury  
8 to her or her property or a deprivation of any right or privilege of a citizen of the United  
9 States. Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992).

10           Plaintiff contends that VMMC, Dr. Thirlby and PacMed were involved in a  
11 conspiracy, dkt. # 122 at 14, but she fails to present evidence suggesting the existence of  
12 "an agreement or meeting of the minds" to violate Plaintiff's constitutional rights. Ward  
13 v. E.E.O.C., 719 F.2d 311, 314 (9th Cir. 1983). Even if Plaintiff is correct that VMMC  
14 and PacMed have a contractual relationship, see dkt. # 122 at 14, the record is  
15 completely devoid of any hint that the purpose of this relationship is to deprive Plaintiff  
16 of equal rights and privileges, or that the relationship is motivated by racial or other  
17 class-based discriminatory animus. Sever, 978 F.2d at 1536. Plaintiff's assertion that  
18 Dr. Thirlby and VMMC denied Plaintiff medical treatment for the purpose of supporting  
19 PacMed's earlier medical findings is insufficient to create a genuine issue of material  
20 fact for trial.

21           **3. 42 U.S.C. § 2000a.<sup>4</sup>**

22           Plaintiff alleges that Defendants violated Title II of the Civil Rights Act, which  
23 provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the

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24           <sup>4</sup>In their reply, Defendants adopt the arguments raised in PacMed's reply memorandum  
25 seeking dismissal of Plaintiff's claims under Titles II, VI, and XI of the Civil Rights Act of  
26 1964. Dkt. # 124 at 4. Because Plaintiff has responded to these arguments, the Court finds  
these claims ripe for consideration.

1 goods, services, facilities, privileges, advantages, and accommodations of any place of  
2 public accommodation, as defined in this section, without discrimination or segregation  
3 on the ground of race, color, religion, or national origin.” 42 U.S.C. § 2000a(a). As an  
4 initial matter, Title II does not prohibit discrimination on the basis of age, gender, or  
5 disability. Thus, Plaintiff’s claims are dismissed to the extent that they are based on  
6 those classifications.

7 With respect to Plaintiff’s claim that Dr. Thirlby denied her corrective surgery  
8 based on his belief that Plaintiff had “Angry Black Women Syndrome,” dkt. # 122 at 7,  
9 Plaintiff has not made the requisite showing to succeed on her claim of race  
10 discrimination. She claims that Dr. Thirlby’s records reflect his decision to deny her  
11 care based on her race, but she has not identified any specific evidence to support her  
12 theory. *Id.* Contrary to Plaintiff’s characterization of the evidence, there is nothing in  
13 the record that suggests that Dr. Thirlby or any other VMMC employee denied Plaintiff  
14 treatment (or any other privilege or accommodation) because of her race. Rather, the  
15 evidence supports a finding that Dr. Schembre and Dr. Thirlby made recommendations  
16 and treatment decisions based on their examinations of Plaintiff and her test results.  
17 Dkt. # 3-2 at 12-13, 16-21; Dkt. # 123 at 3-4. The Court therefore GRANTS  
18 Defendants’ motion for summary judgment on Plaintiff’s Title II claims.

#### 18 **4. 42 U.S.C. § 2000d**

19 Title VI of the Civil Rights Act provides that “[n]o person in the United States  
20 shall, on the ground of race, color, or national origin, be excluded from participation in,  
21 be denied benefits of, or be subjected to discrimination under any program or activity  
22 receiving Federal financial assistance.” 42 U.S.C. § 2000d. A private individual may  
23 sue to enforce Title VI only in instances of intentional discrimination. Alexander v.  
24 Sandoval, 532 U.S. 275, 281 (2001).



1 Plaintiff's claims under Title VI, like her claims under Title II, cannot survive  
2 summary judgment because she has failed to present evidence that Defendants' conduct  
3 was racially motivated and that it constitutes intentional discrimination. Plaintiff's  
4 allegations of intentional discrimination on the basis of her race may be sufficient to  
5 survive a motion to dismiss. However, on a motion for summary judgment, bare  
6 allegations unsupported by legally competent evidence do not create a genuine issue of  
7 material fact. See British Airways Bd. v. Boeing Co., 585 F.2d 946, 953-54 (9th Cir.  
8 1978) (supposition, speculation, and conclusory arguments without evidence are  
9 insufficient to create a genuine issue of material fact). Plaintiff's Title VI claims are  
10 therefore DISMISSED with prejudice.

#### 11 **5. 42 U.S.C. § 2000h**

12 In her third amended complaint, Plaintiff asserts a claim under Title XI of the  
13 Civil Rights Act. Title XI, however, contains miscellaneous provisions related to,  
14 among other things, criminal contempt proceedings arising under the Civil Rights Act  
15 and preemption. 42 U.S.C. §§ 2000h, 2000h-4. Plaintiff has not articulated or shown  
16 the existence of any facts involving criminal contempt and thus, the Court finds  
17 dismissal of Plaintiff's Title XI claim appropriate.

#### 18 **E. ADA**

19 Plaintiff alleges that Defendants denied her medical treatment and  
20 communication on the basis of her mental health disability in violation of Titles II and  
21 III of the ADA. Dkt. # 122 at 10-11. Defendants argue that the undisputed evidence  
22 shows they provided extensive medical treatment and did not deny Plaintiff access to  
23 medical facilities or an accommodation. Dkt. # 59 at 8-10. Moreover, they contend that  
24 any alleged denial was not based on Plaintiff's alleged mental disability. Id.

1 Title II of the ADA prohibits discrimination in programs offered by a public  
2 entity and discrimination by any such entity. 42 U.S.C. § 12132 (“no qualified  
3 individual with a disability shall, by reason of such disability, be excluded from  
4 participation in or be denied the benefits of the services, programs, or activities of a  
5 public entity, or be subjected to discrimination by any such entity.”). To succeed on a  
6 claim under Title II, Plaintiff must demonstrate that (1) she is a qualified individual with  
7 a disability, (2) she was excluded from participation in or denied the benefits of a public  
8 entity’s services, programs or activities, or was otherwise discriminated against by the  
9 public entity, and (3) the exclusion, denial of benefits, or discrimination was by reason  
10 of her disability. Weinrich v. L.A. Cnty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th  
Cir. 1997).

11 Similarly, Title III prohibits discrimination “on the basis of disability in the full  
12 and equal enjoyment of the goods, services, facilities, privileges, advantages, or  
13 accommodations of any place of public accommodation by any person who owns, leases  
14 (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a). To  
15 establish a prima facie case of discrimination under Title III, Plaintiff must show (1) she  
16 has a disability, (2) Defendants are private entities that own, lease, or operate a place of  
17 public accommodation, and (3) she was denied public accommodations by Defendants  
18 because of her disability. Molski v. M.J. Cable, Inc., 481 F.3d 724, 730 (9th Cir. 2007).

19 Assuming that Plaintiff is a qualified individual with a disability, Plaintiff’s  
20 claims cannot survive summary judgment because she has not shown that she was  
21 denied the benefits of a public entity’s services (Title II) or public accommodations by a  
22 private entity (Title III) by reason of her disability. Although somewhat unclear,  
23 Plaintiff’s claims appear to be premised on Defendants’ failure to perform exploratory  
24 surgery as recommended by Dr. Schembre in the fall of 2009. Dkt. # 122 at 6, 8.

1 To the extent Plaintiff's claims are based on her disagreement with Defendants'  
2 medical treatment decisions, the Court finds that these claims fail as a matter of law.  
3 Several courts have distinguished between ADA claims based on inadequate care and  
4 claims based on discriminatory medical care. Burger v. Bloomberg, 418 F.3d 882, 883  
5 (8th Cir. 2005) ("a lawsuit under the Rehab Act or the Americans with Disabilities Act  
6 (ADA) cannot be based on medical treatment decisions."); Fitzgerald v. Corrections  
7 Corp. of America, 403 F.3d 1134 (10th Cir. 2005) ("These are the sort of purely medical  
8 decisions that we have held do not ordinarily fall within the scope of the ADA or the  
9 Rehabilitation Act."); Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) ("The ADA  
10 does not create a remedy for medical malpractice."). Here, the essence of Plaintiff's  
11 claims is that Defendants were negligent and failed to provide appropriate care for her  
12 ongoing symptoms. Because these allegations sound in medical malpractice rather than  
discrimination, the Court finds that they fail as a matter of law.

13 Where Plaintiff expressly argues that Dr. Thirlby declined to operate on her  
14 because of her mental health history, dkt. # 122 at 15, the Court finds that Plaintiff has  
15 failed to create a genuine issue of material fact sufficient to defeat summary judgment.  
16 Contrary to Plaintiff's characterization of Dr. Thirlby's consultation notes, dkt. # 122 at  
17 15, her medical records do not suggest any discriminatory conduct. Rather, Dr.  
18 Thirlby's notes reveal that his decision not to perform exploratory surgery in December  
19 2009 was based on the lack of a clear diagnosis and the high risk of the procedure, not  
20 her alleged mental health disability. Dkt. # 3-2 at 20-21. Absent evidence that  
21 Defendants denied Plaintiff necessary treatment or an accommodation because of  
22 disability, the Court finds no genuine issue of material fact and GRANTS Defendants'  
23 motion for summary judgment with respect to Plaintiff's ADA claims.  
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1 **F. Age Discrimination Act of 1975**

2 The Age Discrimination Act of 1975 provides that “no person in the United  
3 States shall, on the basis of age, be excluded from participation in, be denied the benefits  
4 of, or be subjected to discrimination under, any program or activity receiving Federal  
5 financial assistance.” 42 U.S.C. § 6102. The Act contains an administrative exhaustion  
6 requirement. *Id.* § 6104(e)(2). To exhaust the administrative remedies, a claimant must  
7 file a complaint with the United States Department of Education, Office for Civil Rights  
8 (“OCR”) within 180 days from the date she first becomes aware of the discrimination.  
9 34 C.F.R. § 110.3; 34 C.F.R. § 110.31(a). If 180 days have passed since the claimant  
10 submitted her complaint and OCR has not made a finding or has issued a finding in  
11 favor the recipient of funds, the claimant may file a complaint in federal court. 34  
12 C.F.R. § 110.39(a).

13 Defendants argue that Plaintiff’s claims must be dismissed because she has not  
14 exhausted her administrative remedies. Dkt. # 124 at 5. In response, Plaintiff contends  
15 that she complied with the pre-filing requirements of the Age Discrimination Act by  
16 contacting the U.S. Department of Health and Human Services, Office for Civil Rights  
17 (“HHS”) regarding her various civil rights claims. Dkt. # 122 at 12; Dkt. # 133 at 11.  
18 Even though Plaintiff did in fact file a complaint with HHS, dkt. # 98-2 at 11, 13-14, she  
19 failed to file it within the 180 day time limit set by the regulations and she failed to  
20 submit her complaint to the appropriate agency. Dkt. # 98-2 at 11, 13-4. Furthermore,  
21 there is no indication that Plaintiff gave notice to the Secretary of Health and Human  
22 Services, the United States Attorney General, or Defendants at least 30 days prior to  
23 filing her this action as required by the statute. 42 U.S.C. § 6104(e)(1); *see* 34 C.F.R. §  
24 110.39(b)(3)(iii). Because there is nothing in the record that suggests that Plaintiff has  
25 complied with the notice or exhaustion requirements set forth in the statute and

1 implementing regulations, her claims under the Age Discrimination Act are dismissed  
2 with prejudice.

### 3 **G. HIPAA**

4 Defendants argue that Plaintiff's HIPAA claims must be dismissed because  
5 HIPAA does not provide a cause of action for a private litigant. Dkt. # 59 at 11. The  
6 Court agrees. Webb v. Smart Document Solutions, LLC, 499 F.3d 1078, 1082 (9th Cir.  
7 2007) ("HIPAA itself does not provide for a private right of action") (citing 65 Fed.  
8 Reg. 82601 (Dec. 28, 2000)). Because HIPAA provides no private right of action, the  
9 Court GRANTS Defendants' motion for summary dismissal of Plaintiff's HIPAA  
10 claims.<sup>5</sup>

### 11 **H. Health Care Fraud**

12 Defendants seek summary dismissal of Plaintiff's health care fraud claims  
13 because the health care fraud statute does not provide a private cause of action. Dkt. #  
14 59 at 11-13. 18 U.S.C. § 1347 imposes criminal penalties on persons who knowingly  
15 and willfully execute a scheme to defraud a health care benefit program and 18 U.S.C. §  
16 1349 imposes the same penalties on persons who attempt or conspire to commit health  
17 care fraud. Because neither 18 U.S.C. § 1347 nor 18 U.S.C. § 1349 provides a private  
18 right of action, Plaintiff's claims regarding health care fraud fail as a matter of law.

### 19 **I. Defamation, Libel and Slander**

20 In both her second amended complaint and her third amended complaint, Plaintiff  
21 makes fleeting references to defamation, libel, and slander. Dkt. # 15 at 2, 4-5; Dkt. #  
22 62 at 5. Defendants argue that the Court should decline to exercise supplemental

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23 <sup>5</sup>Plaintiff's argument that HIPAA establishes the standard of care for Defendants'  
24 negligence, see dkt. # 122 at 15; dkt. # 133 at 8, is not persuasive. Plaintiff has not asserted  
25 any negligence claims in this action (nor is it likely that she could successfully do so because  
26 they would likely be barred by the doctrine of res judicata, which precludes litigation in a  
subsequent action of any claims that were raised or could have been raised in a prior action).

1 jurisdiction over these claims after dismissal of Plaintiff's federal claims. See Dkt. # 59  
2 at 13.

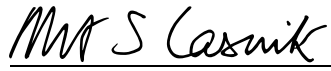
3 In any civil action where a district court has original jurisdiction, the district court  
4 has supplemental jurisdiction over all other claims that form part of the same case or  
5 controversy. 28 U.S.C. § 1367(a). If the federal claims are dismissed before trial, the  
6 state law claims "should" be dismissed. United Mine Workers v. Gibbs, 383 U.S. 715,  
7 726 (1966). The Supreme Court has stated that "in the usual case in which all federal-  
8 law claims are eliminated before trial, the balance of factors . . . will point toward  
9 declining to exercise jurisdiction over the remaining state-law claims." Carnegie-  
10 Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988).

11 Because the Court has dismissed all of Plaintiff's federal claims against  
12 Defendants, the Court declines to exercise supplemental jurisdiction over Plaintiff's  
13 remaining state law claims. Ove v. Gwinn, 264 F.3d 817, 826 (9th Cir. 2001) ("A court  
14 may decline to exercise supplemental jurisdiction over related state-law claims once it  
15 has dismissed all claims over which it has original jurisdiction.") (internal quotation  
16 marks and citations omitted). Plaintiff's defamation, libel, and slander claims are  
17 therefore dismissed without prejudice.

### 18 **III. CONCLUSION**

19 For all of the foregoing reasons, the Court GRANTS Defendants' motion for  
20 summary judgment (Dkt. # 59). Plaintiff's federal claims against Dr. Thirlby and  
21 VMMC are dismissed with prejudice. Plaintiff's libel, slander, and defamation claims  
22 are dismissed without prejudice.  
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1 DATED this 3rd day of January, 2014.

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4 Robert S. Lasnik  
5 United States District Judge  
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